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IN THE
COURT OF APPEALS OF INDIANA

FREMONT INVESTMENT & LOAN, and ERMA CRUMPTON,	)	
Appellants-Defendants,	)	
vs.	)	No. 49A02-0511-CV-1031
LASALLE NATIONAL BANK, AS TRUSTEE FOR AFC MORTGAGE, LOAN ASSET BACKED CERTIFICATE SERIES 1999-1, UNDER THE POOLING AND SERVICING AGREEMENT, DATED AS OF 2/01/99,	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John Price, Judge
Cause No. 49D07-0409-MF-1797

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Fremont Investment and Loan ("Fremont") and Erma Crumpton appeal the trial court's grant of summary judgment and decree of foreclosure in favor of LaSalle National Bank ("LaSalle"). We reverse and remand.

Issue

The sole restated issue is whether the trial court properly ordered the foreclosure of property, purchased by Crumpton and mortgaged to Fremont, to satisfy a debt owed to LaSalle by another party.[1]

Facts

On February 22, 1999, Phillip Brown executed two warranty deeds in favor of Roberta Kirby for property located at 1635 North Central Avenue in Indianapolis. These deeds were recorded on March 2, 1999. One of the deeds stated that it was for "Building B" and the other stated that it was for "Building A." The legal description for the deed conveying "Building B" stated in part as follows: "Part of Lot 2 in Eli P Ritter's Subdivision of Lots 2 and 3 in Thomas Johnson Heirs Addition to the City of Indianapolis . . . to wit; Beginning at a point on the South line of said Lot 2 at a point 81 feet and 3 inches East of the Southwest corner of said Lot 2, thence North at right angles to the said South line . . . ." App. p. 111. The legal description for the deed purporting to convey "Building A" was identical in pertinent part to the legal description for "Building B."

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[1] We hereby grant Fremont and Crumpton's motion to amend their brief.

On April 25, 2000, the deed for "Building A" was re-recorded "to correct an error by the scrivenor [sic] in the legal description." Id. at 114. The legal description for "Building A" now stated in part: "Part of Lot 2 in Eli P Ritter's Subdivision of Lots 2 and 3 in Thomas Johnson Heirs Addition to the City of Indianapolis . . . to wit; Beginning at a point on the South line of said Lot 2, and running thence East along and with the South line of said Lot, 81 feet 3 inches to a point, thence North at right angles with the South line of said Lot . . . ." Id. at 115. In plain English, under this legal description "Building A" begins at the southwest corner of Lot 2 and runs to the east for eighty-one feet and three inches. "Building B" begins at that point, i.e., eighty-one feet and three inches to the east of the southwest corner of Lot 2. For purposes of this appeal, we will refer to the western portion of Lot 2 as "Building A" and the eastern portion of Lot 2 as "Building B."

On September 4, 2001, the deed for what had been designated "Building A" was re-recorded yet again. This time, however, the "A" was scratched out and replaced with a "B," so that the deed now referenced "Building B." Additionally, the legal description was changed again to describe property "Beginning at a point on the South line of said Lot 2 at a point 81 feet 3 inches East of the Southwest corner of said Lot 2 . . . ." Id. at 117. In other words, it would appear that as of September 4, 2001, there were two deeds on record from Phillip Brown to Roberta Kirby conveying the identical piece of property, i.e. "Building B" located on the eastern half of Lot 2 in the Eli P. Ritter subdivision.

Also on February 22, 1999, Kirby executed two mortgages in favor of Alliance Funding Company, LaSalle's predecessor-in-interest. As with the deeds, one mortgage

purported to be for "Building A" and one purported to be for "Building B," and they were both recorded on March 2, 1999. The legal descriptions accompanying the recorded mortgages were the same as those for the deeds; that is, they both described the eastern portion of Lot 2. As with the deeds, the mortgage for "Building A" was re-recorded on April 25, 2000, to change that building's legal description to the western portion of Lot 2. Again, as with the deed, the mortgage was re-recorded on September 4, 2001, with the "A" on the first page of the mortgage being replaced with a "B" and the property's legal description being changed again to the eastern portion of Lot 2. Thus, on September 4, 2001, there were two mortgages on record from Kirby to Alliance encumbering the identical piece of property, i.e. "Building B" located on the eastern half of Lot 2 in the Eli P. Ritter subdivision.

On October 18, 2001, Brown conveyed to Crumpton by warranty deed "1635 Central., Indianapolis, IN." Id. at 124. The legal description for the property read in part: "Part of Lot 2 in Eli P. Ritter's subdivision of Lots 2 and 3 in Thomas Johnson Heirs Addition to the City of Indianapolis . . . to wit: Beginning at the Southwest corner of said Lot 2, and running thence East along and with the South line of said Lot, 81 feet 3 inches to a point . . . ." Id. at 126. On that same date, Crumpton executed a mortgage in favor of Fremont on the property. The legal description for the mortgage was identical to that for the deed. Thus, Brown deeded and Crumpton mortgaged the western portion of Lot 2, also known as "Building A." Both the deed and mortgage were recorded on November 7, 2001.

On September 27, 2004, LaSalle filed a complaint against Kirby, Crumpton, Fremont, and others, to foreclose the mortgage on the property "commonly known as 1635 N. Central Avenue Bldg. A . . . ." Id. at 18. The complaint also states that the mortgage on the property was recorded on March 2, 1999, but it does not mention the 2000 and 2001 re-recordings of the mortgage. Crumpton and Fremont's joint answer asserted that it had no notice of LaSalle's mortgage on "Building A" and, therefore, they were bona fide purchasers and lenders for value of that property.

LaSalle moved for summary judgment against all parties. Crumpton and Fremont responded to the motion by designating the history of recordings and re-recordings related to the property at 1635 North Central Avenue. On August 22, 2005, the trial court entered summary judgment in favor of LaSalle, declaring its mortgage to have priority over all other liens. It ordered the property foreclosed to satisfy Kirby's debt to LaSalle; the property to be foreclosed was described as: "Part of Lot 2 . . . Beginning at the Southwest corner of said Lot 2, and running thence East along and with the South line of said Lot, 81 feet 3 inches to a point . . . ." Id. at 11. In other words, "Building A," or the western portion of Lot 2, was ordered sold at a sheriff's sale; "Building B," or the eastern portion of Lot 2, was not. On September 29, 2005, the trial court denied Crumpton and Fremont's motion to correct error. They now appeal.

Analysis

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Matteson v. Citizens Ins. Co. of America, 844 N.E.2d 188, 191-92 (Ind. Ct. App.

2006). Courts must construe all facts and reasonable inferences drawn from those facts in favor of the nonmovant, relying only on those materials designated to the trial court. Matteson, 844 N.E.2d at 192. We must carefully review a grant of summary judgment to ensure that a party was not improperly denied its day in court, but will affirm on any legal theory supported by the record if there are no genuine issues of material fact. Id.

The essence of Crumpton and Fremont's argument is that LaSalle could not foreclose a mortgage on "Building A" because there was no recorded mortgage on that particular property when Crumpton purchased it and mortgaged it to Fremont. Therefore, they urge that their interests in the property are superior to LaSalle's mortgage. When multiple parties claim adverse interests in the same land, the date of recording provides a means to determine priority among those claims. Patterson v. Seavoy, 822 N.E.2d 206, 211 (Ind. Ct. App. 2005). Our recording statute provides:

> (a) The following must be recorded in the recorder's office of the county where the land is situated:
>
> > (1) A conveyance or mortgage of land or of any interest in land.
> >
> > (2) A lease for more than three (3) years.
>
> (b) A conveyance, mortgage, or lease takes priority according to the time of its filing. The conveyance, mortgage, or lease is fraudulent and void as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration if the purchaser's, lessee's, or mortgagee's deed, mortgage, or lease is first recorded.

Ind. Code § 32-21-4-1. The purpose of this statute is to provide protection to subsequent purchasers, mortgagees, and lessees of real property. ABN AMRO Mortg. Group, Inc. v. American Residential Servs., LLC, 845 N.E.2d 209, 218 (Ind. Ct. App. 2006).

A bona fide purchaser or mortgagee of land may seek equitable protection from strict application of the recording statute. First Federal Sav. Bank v. Hartley, 799 N.E.2d 36, 41 (Ind. Ct. App. 2003). "The theory behind the bona fide purchaser defense is that every reasonable effort should be made to protect a purchaser of legal title for a valuable consideration without notice of a legal defect." Keybank Nat'l Ass'n v. NBD Bank, 699 N.E.2d 322, 327 (Ind. Ct. App. 1998). "In order to qualify as a bona fide purchaser, one must purchase in good faith, for valuable consideration, and without notice of the outstanding rights of others." Bank of New York v. Nally, 820 N.E.2d 644, 648 (Ind. 2005).

In assessing whether a purchaser or mortgagee of property had notice of the rights of others, the law recognizes both constructive and actual notice. Id. at 648. "A mortgage provides constructive notice to subsequent purchasers when it is properly acknowledged and recorded." Id. To charge subsequent purchasers or mortgagees with notice, a mortgage must be recorded in the proper county, must contain an accurate legal description of the property, and must be in the "chain of title." Id. at 649-50. Where an error in a legal description causes the recorded mortgage to identify a different body of land, it will not be effective against a subsequent mortgagee who accepted his mortgage in ignorance of the mistake and in bona fide reliance upon the appearance of the public record. Keybank, 699 N.E.2d at 327-28.

The present case requires a straightforward application of the above principles. As set out in the "Facts" section of this opinion, it is clear that on October 18, 2001, and November 7, 2001, the records of the Marion County Recorder's Office revealed the existence of a mortgage on "Building B" and that Brown had conveyed that particular piece of property to Kirby in 1999. The records at that time neither revealed the existence of any mortgage or encumbrance on "Building A," nor that Brown had conveyed it to Kirby. The legal descriptions for the property mortgaged and conveyed clearly described the eastern half of Lot 2 in the Eli P. Ritter subdivision in Indianapolis, or "Building B." On October 18, 2001, Crumpton purchased and mortgaged the western half of Lot 2, or "Building A." The Brown-Crumpton deed and Crumpton-Fremont mortgage were recorded on November 7, 2001. As a matter of law, Crumpton and Fremont did not have constructive notice of any outstanding liens on or other interests in that particular piece of property on that date.

LaSalle essentially wants us to ignore the 2001 re-recordings, contending they are not "material" and not entitled to "any weight." Appellee's Br. p. 7. LaSalle, however, cites no authority for the proposition that a court may choose to ignore duly recorded official documents, and we will not do so. LaSalle does seem to suggest that the September 7, 2001 re-recordings might have been fraudulent in some way, or forgeries, because it claims it had no knowledge of those re-recordings or who filed them. Just hinting at the possibility of fraud, however, does not make it so. Fraud cannot be taken for granted and the party making the charge must prove it. State Farm Mut. Auto. Ins. Co. v. Shuman, 175 Ind. App. 186, 203, 370 N.E.2d 941, 954 (1977). LaSalle designated

no evidence that would contradict the facial validity of the September 2001 re-recordings and the legal descriptions they contained.

LaSalle also designated no evidence that would support a finding that either Crumpton or Fremont had actual notice of LaSalle's outstanding mortgage on "Building A," and it makes no argument that either Crumpton or Fremont had such notice. Notice is actual if it has been directly and personally given to the person to be notified. Keybank, 699 N.E.2d at 327. Actual notice also may be implied or inferred from the fact that the person charged had means of obtaining knowledge that he or she did not use. Id. Whatever fairly puts a reasonable, prudent person on inquiry is sufficient notice to cause that person to be charged with actual notice, where the means of knowledge are at hand and he or she omits to make the inquiry from which he or she would have ascertained the existence of a deed or mortgage. Id. "Whether knowledge of an adverse interest will be imputed in any given case is a question of fact to be determined objectively from the totality of the circumstances." Id. "Circumstances which are merely equivocal will not charge a purchaser or incumbrancer with the duty of making inquiry." First Nat'l Bank of Peoria v. Farmers' & Merchants' Nat'l Bank of Wabash, 171 Ind. 323, 344, 86 N.E. 417, 424 (1908). Because of a lack of evidence that either Crumpton or Fremont had constructive or actual notice of LaSalle's mortgage on "Building A," the trial court erred in granting summary judgment in favor of LaSalle and ordering foreclosure of the mortgage. There are material issues of fact as to whether Crumpton and Fremont were a bona fide purchaser and mortgagee, respectively, of "Building A," against whom LaSalle's mortgage would not be valid.

Crumpton and Fremont argue that rather than remanding this case for further proceedings, we should simply order the entry of summary judgment in their favor. We decline to do so. Although Crumpton and Fremont designated sufficient evidence regarding notice to defeat LaSalle's motion for summary judgment, they failed to designate positive evidence that they both lacked actual knowledge of LaSalle's mortgage. Thus, there still remains a material issue of fact with respect to whether Crumpton was a bona fide purchaser and Fremont a bona fide mortgagee.[2] The issue of whether Crumpton and Fremont lacked actual notice must be litigated through another summary judgment motion with properly designated evidence or through a trial on the merits.

Conclusion

As a matter of law, Crumpton and Fremont lacked constructive notice of LaSalle's mortgage on "Building A" when she purchased and mortgaged that property. There remains a material issue of fact as to whether Crumpton and Fremont had actual notice of the mortgage. We reverse the grant of summary judgment in favor of LaSalle and remand for further proceedings consistent with this opinion.

Reversed and remanded.

SULLIVAN, J., and ROBB, J., concur.

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[2] There seems to be no question of the "valuable consideration" requirement for bona fide purchasers and mortgagees; the Crumpton-Fremont mortgage is for $143,000. Additionally, as a practical matter the "good faith" requirement for bona fide purchasers and mortgagees appears to be largely parallel to the requirement of lacking notice of the outstanding rights of others, or in other words if notice is lacking, good faith is present. See Keybank, 699 N.E.2d at 328 (holding bank's mortgage had priority over earlier mortgage where actual and constructive notice of earlier was lacking, without separately discussing "good faith" requirement for bona fide mortgagees).